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No. 99-1952

In the Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN and WYOMING,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and CHEVRON U.S.A. INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CHEVRON U.S.A. INC.

ROBERT M. WESTBERG
Counsel of Record
Pillsbury Madison & Sutro LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1356

Counsel for Respondent Chevron U.S.A. Inc.

PILLSBURY MADISON & SUTRO LLP

Of Counsel

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly ruled that the issues raised by petitioners on an appeal from an order denying a motion to enforce the Final Settlement Agreement in *In re: Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378 (D.Kan.), are not "discrete and severable" from issues arising under the settlement agreement itself and under the Emergency Petroleum Allocation Act,[1] and therefore fall within the exclusive jurisdiction of the Federal Circuit.

2. Whether the Tenth Circuit could reasonably have concluded that the "interest of justice" standard in the Transfer Statute, 28 U.S.C. § 1631, is not served by transferring petitioners' appeal to the Federal Circuit where the court had determined that petitioners' jurisdictional argument was based on a "fiction" and where petitioners had previously agreed to a dismissal "with prejudice" by the Federal Circuit of an identical appeal by petitioners from the same district court order.

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[1] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

CORPORATE DISCLOSURE STATEMENT AND LIST OF PARTIES TO THE PROCEEDINGS IN THE TENTH CIRCUIT

Respondent Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation, a publicly held corporation.

The petition fails to identify parties to the proceedings in the Tenth Circuit in addition to those named in the caption in this Court: respondents Bill Richardson, Secretary of Energy (successor to Hazel O'Leary), Office of Hearings and Appeals of the United States Department of Energy and George B. Breznay, its Director, and appellants the States of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island and West Virginia, the Territory of Guam and the Virgin Islands (the "Jurisdictions"). The Tenth Circuit's judgment that petitioners seek to review also dismissed an appeal of the Jurisdictions (No. 99-3102) from the same order of the district court from which petitioners appealed. Following that dismissal, the appellant Jurisdictions pursued a previously filed appeal to the Federal Circuit (No. 99-1327). On March 10, 2000, the Federal Circuit issued its judgment in 99-1327 affirming the decision of the district court as to the appellant Jurisdictions.

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BRIEF IN OPPOSITION FOR RESPONDENT CHEVRON U.S.A. INC.

Respondent Chevron U.S.A. Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in that court's docket Nos. 99-3065 and 99-3066 on March 6, 2000.

OPINIONS BELOW

Though petitioners apparently intend to limit their petition to the Tenth Circuit's disposition of the appeal in No. 99-3065 (M.D.L. 378 in the district court), the same circuit court decision dismissed two appeals by petitioners, Nos. 99-3065 and 99-3066. The appeals were based, respectively, on an order of the United States District court for the District of Kansas denying petitioners' motion to enforce the *Stripper Well* Final Settlement Agreement ("FSA") in M.D.L. 378 and a judgment of the same district court dismissing an original lawsuit brought by petitioners (No. 96-1180) containing the same allegations as their motion to enforce. Omitted from the petition is the unreported Order of Dismissal of the district court in No. 96-1180 that dismissed Count I of the original action for failure to state a claim and the remaining counts for lack of standing and, alternatively, improper venue. Appellate Appendix in 99-3066 (hereinafter 99-3066 App) 219-223.

The agency action that petitioners challenged in the district court, a Department of Energy ("DOE") order dated March 25, 1996 dismissing a proposed remedial order to respondent Chevron U.S.A. Inc., is unofficially reported as *Chevron U.S.A. Inc.*, 25 DOE (CCH) ¶ 82,506 (1996). The same agency order was also challenged in *Consolidated Edison Co. of New York v. O'Leary*, 131 F.3d 1475 (Fed.Cir. 1997), *suggestion of lack of jurisdiction rejected sub nom Consolidated Edison Co. of New York, Inc. v. Peña*, 152 F.3d 945 (Fed.Cir. 1998), in which petitioners participated as amici in the district court and on the appeal.

STATEMENT OF THE CASE

The case began as an enforcement proceeding by the DOE against Chevron under regulations establishing domestic crude oil price controls. The controls were originally promulgated pursuant to the Economic Stabilization Act ("ESA").[2] The ESA expired by its terms April 30, 1974,[3] but portions of it were incorporated by reference into § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA").[4] The DOE and its predecessor agencies enforced the controls until their termination by President Reagan in January 1981. The EPAA expired September 30, 1981, subject to a savings clause. Under § 211 of the ESA, as incorporated into the EPAA, on appeals from district court rulings, issues arising under these statutes or the regulations were within the exclusive jurisdiction of the Temporary Emergency Court of Appeals of the United States ("TECA"), and are now within the exclusive jurisdiction of the Federal Circuit.[5]

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[2] Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

[3] Economic Stabilization Act Amendments of 1973, Pub.L. No. 93-28, 87 Stat. 27 (1973).

[4] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

[5] The Public Courts Administration Act of 1992 amended § 211(b) of the ESA to provide:

> (b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292(c) of title 28, United States Code.

Pub.L. 102-572, § 102, 106 Stat. at 4506 (1992). Concurrently, 28 U.S.C. § 1295(a) was amended to add to the Federal Circuit's

(footnote continued)

The statutory and administrative history of the ESA, the EPAA, TECA, and the administrative bodies responsible for enforcing the ESA and EPAA, was recently set forth by the Federal Circuit. *See Phoenix Petroleum Co. v. U.S. F.E.R.C.*, 95 F.3d 1555, 1559-1563 (Fed.Cir. 1996).

In 1992, the DOE's Economic Regulatory Administration ("ERA"), issued a proposed remedial order to Chevron alleging that Chevron had received excessive benefits as a result of its participation during 1980-1981 in a DOE program known as the "Tertiary Incentive Program" ("TIP"). 99-3065 App at 44. The proposed remedial order, if issued as a final order, would have required Chevron to pay the DOE "restitution" of $125.0 million, later increased to $167.3 million, plus interest, for excess benefits allegedly received.

The authority to issue a remedial order was and is the Secretary's. Within the DOE, that authority was delegated to DOE's Office of Hearings and Appeals ("OHA").[6] Chevron requested and was granted a hearing before OHA, limited to the factual issue whether Chevron had received an excessive benefit under the TIP. 99-3065 App at 55-56. Following the hearing, OHA ordered the proposed remedial order dismissed on the ground that the ERA "failed to establish the existence of a substantive violation requiring restitution on the part of Chevron." *Id.* at 57. Specifically, OHA concluded that "Chevron was not unjustly enriched since the firm did not actually receive revenue in excess of its recoupable allowed expenses under TIP, and there was no injury to third parties as a result of the termination of

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jurisdiction appeals under § 211 of the ESA and under § 5 of the EPAA.

[6] The petition incorrectly suggests that the Secretary's discretion to issue a remedial order was delegated to the ERA. Petition at 4, n. 7. The ERA had no authority to issue a remedial order; only the OHA could do so. DOE Delegation Order No. 0204-24 (Mar. 30, 1978), *reproduced in* 99-3065 App at 183-188; *see also* 10 C.F.R. §§ 205.190, 205.193(e), 205.199B (2000).

price controls." *Id.* at 81, footnote omitted. OHA did not reach other issues raised by Chevron in its statement of objections to the proposed remedial order. *Id.* at 56-57.[7]

A number of entities, including petitioners, were allowed to participate in the proceedings before OHA because they claimed a right to share in amounts the DOE might have collected had the proposed remedial order been issued as a final order.[8] Some of those entities then brought separate lawsuits challenging the DOE's decision not to issue a remedial order to Chevron:

(a) *Consolidated Edison Co. of New York v. O'Leary*, No. 96-1149 (D.D.C.), was filed in the District Court for the District of Columbia by a group of utilities and others. That case sought to overturn the OHA order and to compel the DOE to issue a remedial order to Chevron. Chevron, which was not named as a party, intervened and moved with the federal defendants to dismiss on the ground of a lack of standing to sue, among other grounds. In January 1997, the district court ordered the complaint dismissed for lack of standing of the plaintiffs to sue. The Federal Circuit affirmed the dismissal for lack of standing and went on further to say that the decision not to issue a remedial order was within the DOE's discretion and was unreviewable. *Consolidated Edison Co. of New York v. O'Leary*, *supra*, 131 F.3d at 1480. Petitioners participated as amici in *Consolidated Edison* in the district court and in the Federal Circuit.

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[7] The implication in the petition, page 4, that the OHA decision conferred an offset or an entitlements benefit on Chevron is incorrect. *See* 99-3065 App at 80-82, 281-282.

[8] Petitioners describe themselves as "parties" in the proceedings before the OHA. Petition at 4. "The [OHA] is free to permit third parties to participate in proceedings before it, for such assistance as those parties may offer, without creating a right in those parties to review a negative decision that the Office may ultimately make." *Consolidated Edison Co. of New York v. O'Leary*, *supra*, 131 F.3d at 1481.

(b) Motion of Alabama, et al., to Enforce the Final Settlement Agreement ("FSA") in *In Re: Department of Energy Stripper Well Exemption Litigation,* M.D.L. 378 (D.Kan.), and

(c) *Alabama, et al. v. United States Department of Energy, et al.*, No. 96-1180 (D.Kan.).

These two proceedings, filed simultaneously by petitioners, are the subject of the Tenth Circuit decision as to which certiorari is sought. Each challenged the OHA decision on the same grounds that were alleged by the *Consolidated Edison* plaintiffs and in addition on the ground that by dismissing the proposed remedial order against Chevron the DOE violated its obligations under the FSA, which had been approved by the district court in Kansas in 1986.[9] (The *Consolidated Edison* plaintiffs were not parties to the FSA.) In both proceedings, Chevron and the DOE opposed on the merits petitioners' claim that there was a violation of the FSA. 99-3065 App at 91, 109; 99-3066 App at 48, 75. In the original action, No. 96-1180, the DOE and Chevron moved to dismiss the claims not based on the FSA for lack of standing and improper venue. *Ibid.*

Following briefing and argument, the district court denied petitioners' motion to enforce the FSA in M.D.L. 378 and dismissed the action in No. 96-1180. Petition Appendix at C-1 to C-16; 99-3066 App at 219.[10]

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[9] The FSA is described in *In re Dept. of Energy Stripper Well Exemption Lit.*, 653 F.Supp. 108 (D.Kan. 1986).

[10] The district court's order in M.D.L. 378 also denied a separate motion to enforce the FSA brought by another group of states, and others, referred to below as the "Jurisdictions." Petition Appendix at C-1, C-4 to C-5, C-13 to C-16. The denial of the Jurisdictions' motion to enforce was affirmed on appeal to the Federal Circuit in March 2000. *In re the Department of Energy Stripper Well Exemption Litigation*, __ F.3d __, 2000 U.S. App. LEXIS 4431 (Fed.Cir. 2000).

In M.D.L. 378, the district court reviewed the terms of the FSA and concluded that the dismissal of the proposed remedial order violated no duty imposed by the FSA. Petition Appendix at C-9 to C-13. Citing *Consolidated Edison*, the court ruled that the decision not to issue a remedial order to Chevron was within the DOE's prosecutorial discretion and referred to provisions in the FSA that the court ruled shielded the DOE decision from review. Among the provisions of the FSA relied on by the district court is paragraph IV.A.2, which provides, in part:

> [N]othing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

Petition Appendix at C-12 to C-13, quoting the FSA.

The district court limited its ruling in M.D.L. 378 to claims of a violation of the FSA, *id.* at C-3 to C-4. But in docket 96-1180 the court ruled on the non-FSA claims, holding that petitioners lacked standing to protest on non-FSA grounds the DOE's refusal to issue a remedial order to Chevron. In the alternative, the court dismissed those claims for improper venue. 99-3066 App at 220-221. The court dismissed the count of the complaint in 96-1180 that alleged a violation of the FSA "for failure to state a claim", commenting that the claim "fails for the same reason the [petitioners'] motion to enforce in M.D.L. 378 fails." *Ibid.*

Petitioners filed four appeals from the district court's order and judgment, two appeals to the Tenth Circuit (Nos. 99-3065, -3066) and, a month later, two appeals to the Federal Circuit (Nos. 99-1328, -1356). The DOE and Chevron moved to dismiss the Tenth Circuit appeals for lack of appellate jurisdiction. Petition at 7. Petitioners opposed, representing that their appeals would raise only issues within the regional circuit's jurisdiction. *Ibid.* The Tenth Circuit issued an order reserving judgment on the

motions to dismiss, referring the issue of appellate jurisdiction to the merits panel and setting a schedule for briefing on the merits. *Ibid.*

In the Federal Circuit, petitioners moved for an indefinite stay pending completion of the Tenth Circuit proceedings. Petition at 7. The DOE and Chevron opposed the stay on the ground that petitioners were forum shopping in order to avoid the circuit that decided *Consolidated Edison.*[11]

On June 14, 1999, the Federal Circuit denied petitioners' motions for stay and set a date for filing initial briefs on the merits. Federal Circuit Docket Entries, 99-1328, item 3.[12] Petitioners then sought review or reconsideration of the denial, and filed separate motions to suspend the effectiveness of the order denying stay. Federal Circuit Docket Entries, 99-1356, items 11, 16. By order of July 22, 1999, the Federal Circuit denied reconsideration of the denial of the stay, denied the motions to suspend the effectiveness of the June 14 order and set a new due date for initial briefs on August 12, 1999. *Id.*, items 11, 16 and 22. One day before their initial briefs were due in the Federal Circuit, petitioners notified the clerk by letter that they were withdrawing their appeals to that court. *Id.*, item 24. Respondents opposed the withdrawal unless the appeals were dismissed "with prejudice," pointing out that the practical effect of a

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[11] Opposition of Appellee United States Department of Energy to Motion of States of Alabama, et al., to Stay Further Proceedings, Federal Circuit, No. 99-1356; Opposition of Appellee Chevron U.S.A. Inc. to Motion of States of Alabama, et al., to Stay Further Proceedings, Federal Circuit, No. 99-1328.

[12] *See* listing of docket entries in Federal Circuit appeals 99-1328 (and consolidated case 99-1327) and 99-1356, Ex. 4 to Response of Appellee Chevron U.S.A. Inc. to Conditional Motion of Appellants, State of Alabama, et al., for Transfer Pursuant to 28 U.S.C. § 1631, filed Feb. 9, 2000 in Tenth Circuit appeals 99-3065 and 99-3066.

voluntary withdrawal without prejudice could be the equivalent of a stay and an evasion of the Federal Circuit's several orders denying a stay.

On August 31, 1999, the Federal Circuit issued its order on the motion to withdraw:

> The States of [Alabama, et al.] move to voluntarily withdraw appeal nos. 99-1328 and 99-1356. Chevron U.S.A. Inc. and the Department of Energy (DOE) oppose the motion unless the dismissal is "with prejudice". . . .
>
> This court earlier denied Alabama's motion for a stay of proceedings in this court pending completion of proceedings in the United States Court of Appeals for the 10th Circuit, and also denied Alabama's motion for reconsideration of that order. We note that the State of Delaware et al.'s appeal in no. 99-1327, consolidated with Alabama's appeal no. 99-1328, is proceeding.
>
> In light of these circumstances, any dismissal entered in appeal nos. 99-1328 and 99-1356 will be with prejudice. As Chev[r]on and DOE point out, if a dismissal is entered without prejudice, Alabama could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect its appeal here by way of transfer. That would be an impermissible result, given our prior rulings and the fact that appeal no. 99-1327 is proceeding in this court.

Order, U.S. Court of Appeals for the Federal Circuit, Nos. 99-1327, 99-1328, 99-1356, August 31, 1999.

The Federal Circuit accordingly ordered that, "[a]bsent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals *and dismiss them with prejudice*." *Ibid.*, emphasis added. Petitioners' counsel then notified the Federal Circuit that petitioners had "no objection" to the dismissal with prejudice. Petition at 9, n. 15. On September 13, 1999 the Federal Circuit entered two orders dismissing appeals 99-1328 and 99-1356 "with prejudice," pursuant to the August 31, 1999 order.

No petition for rehearing or other form of relief from the dismissals was sought. The dismissals with prejudice are final.

In the meantime, briefing in the Tenth Circuit was completed on the merits. With petitioners' arguments at last laid bare, the Tenth Circuit on November 5, 1999 issued its Order and Judgment dismissing both of petitioners' appeals for lack of appellate jurisdiction. As amended upon denial of rehearing, the decision points out that petitioners had "carefully phrased" the issues to avoid any mention of the FSA, Petition Appendix at A-11, and engaged in "careful semantics," *ibid.*, but that the court would not "participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA." *Id.* at A-13. The court concluded that to grant petitioners the relief they requested would require the court "to reject a Federal Circuit decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA directly on point, and consider a defense implicating the FSA." *Id.* at A-13 to A-14, footnote omitted.[13]

The Tenth Circuit decision relied on TECA precedent that TECA's (now the Federal Circuit's) exclusive jurisdiction extends to issues that do not themselves arise under the EPAA when "'a meaningful ruling requires consideration of the issues as a whole, the construction of the EPAA will control the litigation, the issues are so commingled as to render separate treatment impractical, or

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[13] Under TECA precedents, as adopted by the Federal Circuit, interpretation and application of the FSA is an issue of law arising out of the laws and regulations concerning the ESA and is within the exclusive jurisdiction of TECA (and now the Federal Circuit). *In re Dept. of Energy Stripper Well Exemption Lit.*, 864 F.2d 796, 799 (Temp.Emer.Ct.App. 1988) (case seeking an interpretation of the FSA, to resolve dispute between signatories, held within TECA's exclusive jurisdiction). Petitioners did not contest in the court below that interpretation of the FSA is a matter within the Federal Circuit's exclusive jurisdiction.

the non-EPAA issues are subsidiary, preliminary or threshold to an EPAA issue.'" Petition Appendix at A-14, quoting *Phoenix Petroleum Co., supra,* 95 F.3d at 1563, and *Pennzoil Exploration and Production Co. v. Lujan*, 928 F.2d 1139, 1141 (Temp.Emer.Ct.App. 1991). The court concluded that the same was true

> when issues not otherwise relating to the FSA are so inextricably linked and subsidiary to the FSA claim that it would be both impractical and wasteful to consider those claims separately.

Petition Appendix at A-14.

The court concluded that petitioners' claims that do not on their face implicate the FSA "in fact are so secondary in relevance and importance to their FSA companions that they must fall within the Federal Circuit's exclusive jurisdiction." *Id.* at A-15.[14]

A petition for rehearing with suggestion for rehearing en banc was denied. *Id.* at A-2. While the petition for rehearing was pending, petitioners filed a conditional motion to transfer the appeals to the Federal Circuit under 28 U.S.C. § 1631. The court denied the motion for transfer, pointing out the Federal Circuit's August 31, 1999 order referring to dismissal of petitioners' earlier appeals "with prejudice" and petitioners' "ample opportunity to pursue these cases in the proper forum". Petition Appendix at A-15-16. The court concluded that it could not say that justice would be served by the transfer. *Ibid.*

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[14] The issues petitioners sought to raise in the Tenth Circuit included whether the district court erred in (a) declining to address arguments raised by petitioners for the first time in their reply brief, *see* Brief for Appellants in 99-3065 at 38, (b) concluding that its jurisdiction in M.D.L. 378 is limited to enforcement of the terms of the FSA, *id.* at 43, and (c) relying on *Consolidated Edison*. *Id.* at 21-38. In 99-3066, petitioners urged that the trial court's decision on standing was "fatally infected" by the *Consolidated Edison* approach. Brief for Appellants States of Alabama, et al., 99-3066, at 21.

REASONS WHY THE WRIT SHOULD BE DENIED

The Tenth Circuit's rejection of petitioners' "careful semantics" and its refusal "to participate in the fiction" that the case does not turn on the ESA/EPAA raise no issues warranting review by this Court. The circuit court's rulings are limited to the unique formulation of petitioners' arguments in their briefs. The petition's claim of important issues of judicial management in connection with allocation of jurisdiction, Petition at 13, does not live up to its promise. Petitioners simply disagree with the Tenth Circuit's ultimate determination that the issues petitioners sought to raise were not discrete and severable from the ESA/EPAA and FSA issues or were inextricably linked or subsidiary. Petitioners' disagreement with the decision is at most what this Court characterized as a "marginal jurisdictional dispute," *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 819 (1988), and one that is in regard to a statute from a prior era. In addition, the Tenth Circuit's decision does not conflict with any other decision of any court.

Petitioners now describe the case as one brought by "public officials seeking to vindicate public rights" under a "massive" settlement agreement. Petition at 11. This description tends to show the correctness of the Tenth Circuit's view that the case turns on the FSA, notwithstanding petitioners' care to avoid mention of the FSA in that court. *See* Petition Appendix at A-13. But the description is also misleading because the petition never addresses the detailed terms of the FSA that pertain specifically to enforcement of public rights:

> *Future DOE Actions.* With the sole exception set forth in Paragraph II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the

> enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

FSA, paragraph IV.A.2, 99-3065 App at 154.[15]

Similarly, FSA paragraph VI.B provides that the FSA shall not "create any right of action against DOE concerning the initiation, continuation or conduct of any litigation." Petition Appendix at C-13, quoting the FSA.

The above FSA provisions are entirely consistent with an unbroken line of decisions stating that enforcement of the ESA/EPAA regulations under § 209 of the ESA "is the exclusive right of the government."[16] Third parties, such as petitioners, have no right to challenge the results of a public enforcement proceeding. During the period of price controls and for nearly two decades thereafter, TECA and the Federal Circuit consistently distinguished between the public and private mechanisms for enforcing the regulations under §§ 209 and 210 of the ESA and "emphasized the independence of these separate statutory remedies, repeatedly cautioning against '[t]he commingling of private and agency enforcement devices for which Congress has made separate provision.'"[17]

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[15] The "sole exception" referred to in paragraph IV.A.2 pertains to DOE's waiving certain civil penalties against some of the parties to the FSA. The district court ruled this exception inapplicable to the dispute before the court. 99-3065 App at 283.

[16] *Consolidated Edison, supra*, 131 F.3d at 1478, quoting *Ashland Oil, Inc. v. United States Dep't of Energy*, 760 F.2d 298, 303 (Temp.Emer.Ct.App. 1985); *see also Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 275-76 (Temp.Emer.Ct.App. 1988).

[17] *Consolidated Edison, supra*, 131 F.3d at 1478, quoting *Dyke v. Gulf Oil Corp.*, 601 F.2d 557, 567 (Temp.Emer.Ct.App. 1979).

Thus under both long-settled law and the express terms of the FSA, to which petitioners agreed, any suggestion that the case qualifies for review because petitioners seek to "vindicate public rights" rings hollow indeed.

Moreover, petitioners did not contest below and do not contest here that the issues whether third parties have rights to obtain review of a DOE decision not to issue a remedial order and whether the FSA confers such rights on these petitioners both arise under the ESA/EPAA and are thus both within the Federal Circuit's exclusive jurisdiction. No reason is shown for this Court, nearly 20 years after expiration of the EPAA, to reopen these settled issues.

Petitioners' further assertion, that the court of appeals ruled that petitioners' "voluntary withdrawal of a protective appeal in the Federal Circuit . . . precluded transfer to the latter court", Petition at 12, is disingenuous, to say the least. The Tenth Circuit did not announce a rule that a transfer would be denied simply because of a withdrawal of a protective appeal. Petitioners sought and accepted a dismissal "with prejudice" of their appeals in the Federal Circuit *after* that court had explained why such dismissal would be "with prejudice" and after it ruled that to resurrect their appeal by way of transfer from the Tenth Circuit would be "impermissible." Petition Appendix at A-17. Petitioners' agreement to the Federal Circuit's dismissal "with prejudice," if it does not judicially estop petitioners from now seeking a transfer of the Tenth Circuit appeals, at the very least justifies a conclusion that transfer is not in the interest of justice. The Tenth Circuit correctly referred to petitioners' "ample opportunity to pursue these cases in the proper forum." Petition Appendix at A-17 to A-18. The issues claimed to be raised by the petition are thus not presented on the facts of his case.

There is also no conflict with *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771 (D.C.Cir. 1984). The issue in *Atlantic Richfield* was whether, under § 503 of the

Department of Energy Organization Act ("DOEOA"),[18] the Secretary of Energy has adjudicatory power in regard to the issuance of remedial orders. The *Atlantic Richfield* action was brought by the recipient of a remedial order to set aside an administrative levy of discovery sanctions imposed by the OHA under authority delegated from the Secretary. In this case, petitioners are third parties who seek to challenge, as a violation of the FSA, a DOE decision *not* to issue a remedial order. The Tenth Circuit concluded that petitioners' right to review the DOE decision on a motion to enforce the FSA directly involves the ESA, the EPAA and the FSA itself and is within the exclusive jurisdiction of the Federal Circuit. Petition Appendix at A-12 to A-14. Neither *Atlantic Richfield*, nor any other decision, is to the contrary.[19]

Petitioners do claim an inconsistency between certain language in *Consolidated Edison* and *Atlantic Richfield* relating to the legislative history of § 503 of the DOEOA and whether the Secretary has adjudicative as well as prosecutorial powers in regard to remedial orders. Petition at 17 & n. 20. Petitioners' disappointment that the Tenth Circuit would not review *Consolidated Edison* on that point is not a reason for this Court to review the decision that the issues on this appeal are for the Federal Circuit. Whether *Consolidated Edison* is right or wrong on that point would not change the outcome in that case that third parties may not insist that public enforcement proceedings be brought under the ESA/EPAA, or the Tenth Circuit's decision that exclusive jurisdiction to review the district court's actions is

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[18] 42 U.S.C. § 7193 (1997).

[19] It is significant that, though the district court ruled in the original action brought by petitioners (96-1180) that petitioners lacked standing to challenge the OHA decision on non-FSA grounds, citing *Consolidated Edison*, the petition nowhere challenges that determination or the Tenth Circuit's ruling that the standing issue is within the exclusive jurisdiction of the Federal Circuit.

in the Federal Circuit. As noted above, n. 19 ante, the petition raises no issue as to petitioners' standing to challenge the DOE action on grounds not based on the FSA. And in view of the FSA's provisions that nothing in the FSA shall be construed to impose a duty on DOE in regard to enforcement matters, petitioners' disagreement with *Consolidated Edison*, is beside the point.

I. THERE IS NO UNSETTLED ISSUE AS TO ALLOCATION OF JURISDICTION AMONG THE CIRCUIT COURTS. THE TENTH CIRCUIT SIMPLY HELD THAT PETITIONERS' APPEAL PRESENTS ISSUES UNDER THE ESA, THE EPAA AND THE FSA.

The district court's ruling denying petitioners' motion to enforce the FSA in M.D.L. 378 determined that there was no violation of the FSA. The court reasoned that the DOE decision not to issue a remedial order was an exercise of prosecutorial discretion and unreviewable (citing *Consolidated Edison*) and that the FSA itself specifically preserves the DOE's discretion and "shields it from review." Petition Appendix at C-9 to C-12. In the companion case brought by petitioners, No. 96-1180, the district court held, based on *Consolidated Edison*, that petitioners lacked standing to sue on their claims *not* based on the FSA. It has been long settled, and was not disputed below, that, on an appeal, the merits of the district court's rulings that the FSA was not breached and that petitioners lacked standing to sue on the non-FSA claims would be issues within the exclusive jurisdiction of the Federal Circuit.[20]

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[20] *See In re Dept. of Energy Stripper Well Exemption Lit.*, 864 F.2d 796, 799 (Temp.Emer.Ct.App. 1988) (interpretation of the FSA held within TECA's exclusive jurisdiction); *Consolidated Edison, supra*, 131 F.3d 1478-1480 (right of third parties to challenge DOE enforcement decisions held to turn on a construction of §§ 209-211 of the ESA).

In an effort to avoid the Federal Circuit, petitioners contended vehemently in the Tenth Circuit that the district court had ruled that it "lacked jurisdiction" to hear and decide the claims under the FSA, because its opinion stated that the DOE decision not to issue a remedial order was part of the prosecutorial function of the Secretary of Energy and unreviewable. *See, e.g.,* Brief for Appellants States of Alabama, et al., in No. 99-3065 at 14, 18-19. Petitioners further contended that the reviewability of the DOE decision was an issue arising solely under the DOEOA, and within the jurisdiction of the Tenth Circuit.

It is highly improbable that the district court, in the context of the motion to enforce the FSA, concluded that it lacked jurisdiction, however the court may have viewed the reviewability of the DOE decision in the absence of the FSA: (1) the district court in fact had jurisdiction to interpret the FSA under ESA § 211 and the reservation of jurisdiction in the *Stripper Well* case, 653 F.Supp. 108, 121 (D.Kan. 1986), as petitioners acknowledge, (2) no party suggested that the district court lacked jurisdiction, (3) the district court's opinion stated that its jurisdiction in M.D.L. 378 was "limited to enforcement of the terms of the FSA," Petition Appendix at C-3, (4) the district court ruled on the FSA claims on the merits and in detail, and (5) the district court's order of dismissal in No. 96-1180 was based on "failure to state a claim" as to the FSA claims, and lack of standing as to the other claims, with no suggestion of a lack of jurisdiction. *See* 99-3066 App at 220.

The Tenth Circuit nonetheless accepted petitioners' contention that the district court ruled that it lacked jurisdiction. Petition Appendix at A-12. But the Tenth Circuit correctly rejected petitioners' argument that reviewability of the DOE decision turned solely on the DOEOA; notwithstanding petitioners' "careful semantics," Petition Appendix at 11, there were no issues discrete and severable from the ESA/EPAA issues:

> . . . [D]etermining whether the OHA's decision in this case is properly reviewable would require this court to

> consider issues arising both under the ESA and EPAA directly and under the FSA. The district court based its ruling that the decision was not reviewable on Consolidated Edison Co. v. O'Leary, 131 F.3d 1475 (Fed.Cir. 1997), and the States ask us to reject this authority. (*See* States' 99-3065 Br. at 27-29.) However, even a brief glance at that case reveals that the Federal Circuit relied heavily on interpretation of ESA/EPAA issues to reach its result. *See* O'Leary, 131 F.3d at 1478 ("Four statutes are pertinent to this issue: sections 209, 210, and 211 of the ESA, which were incorporated into the EPAA, and section 503 of the Department of Energy Organization Act (DOEOA)."). The States would have us focus only on whether the DOEOA precludes review of the OHA's decision, but it is clear that the case relied upon by the district court to dismiss the States' claims involved the ESA and EPAA. As such this claim clearly arises under those statutes.

Petition Appendix at A-12.

The Tenth Circuit also recognized (as had the district court) that it could not rule on the reviewability of the OHA decision under the FSA without considering the effect of paragraph IV.A.2 of the FSA (set forth at page 11-12 ante):

> We are at a loss to see how the issue presented to this court could be decided without reference to this highly probative provision of the agreement underlying this dispute. (*See* also FSA ¶ VI.B. ("[The FSA] shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation.").)
>
> . . . . .
>
> This court declines to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA. In order to grant the relief sought by the States, we would have to conduct inquiries specifically committed to the expertise of the Federal Circuit. Specifically, we would have to reject a Federal Circuit

> decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA directly on point, and consider a defense implicating the FSA.

Petition Appendix at A-13 to A-14, footnote omitted.

The petition claims that this Court's intervention is needed to provide guidance "for this and similar cases." Petition at 14. But the issues created by petitioners' extensive efforts to avoid the proper forum are without doubt unique to this litigation. In any event, they are fact-bound and relate to a statutory scheme that expired nearly two decades ago. Review by the Court could require examination of records in two circuit courts on questions of fact and the parties' articulation of legal issues that can be of no importance to any other litigant.

II. PETITIONERS DID NOT RAISE AN ABSTENTION ISSUE BELOW AND THE TENTH CIRCUIT DECIDED NO ISSUE INVOLVING ABSTENTION.

The petition's strained suggestion that the Tenth Circuit found that it had jurisdiction and failed to follow established rules of abstention, Petition at 20-23, is wholly outside the issues created by the rulings below.

First, petitioners never raised any issue concerning abstention in the court of appeals; the issue is raised for the first time in the petition for certiorari.

In addition, the court of appeals did not apply any rules of abstention. Rather, the court, after considering full briefing on both its jurisdiction and the merits, ruled that the appeal turns squarely on the ESA, the EPAA and the FSA, and declined to participate in the "fiction" that it is otherwise. Petition Appendix at A-13. The court also held that the secondary issues raised by petitioners are "so inextricably linked and subsidiary to the FSA claim that it would be both impractical and wasteful" to consider them separately and are "so secondary in relevance and importance . . . that they must fall within the Federal

Circuit's *exclusive* jurisdiction." Petition Appendix at A-14 to A-15, emphasis added.

Thus, the claimed conflict with this Court's abstention rules does not exist and Question II stated by the petition is not presented.

III. THE TENTH CIRCUIT'S HOLDING THAT TRANSFER OF THE APPEALS TO THE FEDERAL CIRCUIT IS NOT IN THE INTEREST OF JUSTICE TURNS UPON THE UNIQUE FACTS OF THIS CASE AND RAISES NO IMPORTANT QUESTION FOR SETTLEMENT BY THIS COURT.

Question 3 presented in the petition is whether the interest of justice standard in the Transfer Statute, 28 U.S.C. § 1631, can be applied "to exclude appellant states from all appellate forums because they declined to proceed on the merits in two courts simultaneously." But the Tenth Circuit did not decide that issue.

Rather, the Tenth Circuit appears to have viewed petitioners' request for transfer as flouting the Federal Circuit's order dismissing petitioners' appeals to that Court "with prejudice." The Tenth Circuit particularly noted the Federal Circuit's August 31, 1999 Order stating that to "resurrect [the] appeal here by way of transfer" would be "impermissible." Petition Appendix at A-17, quoting Order, U.S. Court of Appeals for the Federal Circuit, Nos. 99-1327, 99-1328, 99-1356, August 31, 1999. Counsel for petitioners, after receiving the Federal Circuit's order, advised the Federal Circuit that petitioners had "no objection" to the dismissal "with prejudice." Petition at 9, n. 15. The Tenth Circuit also noted that petitioners had "ample opportunity" to pursue the appeals in the proper forum. Petition Appendix at A-17 to A-18.[21]

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[21] As pointed out in *Coleman v. U.S.*, 106 F.3d 339 (10th Cir. 1997), a case relied upon by petitioners, the Congress

(footnote continued)

The petition challenges, for the first time, the Federal Circuit's order of dismissal "with prejudice." Petition at 26, notes 26, 27. Petitioners never preserved this issue for this Court. They agreed to the Federal Circuit's dismissal of their appeals "with prejudice," knowing exactly what the Federal Circuit intended. Likewise, petitioners' quibbling with the meaning of the term "with prejudice," Petition at 22, and labeling the material portions of the Federal Circuit's August 31 order as "non-precedential" or "dicta", Petition at 8, 9, 25, obscure the point. Petitioners do not claim that they did not understand what the Federal Circuit intended. "Whatsoever a man soweth, that shall he also reap."[22]

The Tenth Circuit panel was fully aware of the burden imposed on respondents and two circuit courts by petitioners' insistence on appealing to the Tenth Circuit. In the circumstances of this case, both circuit courts would have been justified in concluding that petitioners were engaged in forum shopping to avoid the court that decided *Consolidated Edison*. Forum shopping "requires courts to squander public resources in adjudicating the propriety of manipulative efforts to gain access" to a particular forum. *Cummings v. United States*, 648 F.2d 289, 290 (5th Cir. 1981). The legislative history of § 1631 spells out that Congress was concerned with avoiding appellate forum shopping. S. Rept. 97-275, pp. 5, 19-20, *reprinted in* 2 1982 U.S.C.C.A.N. 15, 29-30. While that concern was expressed primarily in regard to patent claims, it was not limited to patent claims. *Atari, Inc. JS&A Group, Inc.*,

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contemplated that § 1631 would aid litigants "who were confused about the proper forum for review." *Id.* at 341, quoting *Liriano v. United States*, 95 F.3d 119, 122 (2d Cir. 1996), internal quotation marks omitted. Petitioners do not claim that they were "confused" about the proper forum or that they erroneously selected the wrong forum.

[22] Galations 6, 7.

747 F.2d 1422, 1437 (Fed.Cir. 1984), *overruled on other grounds in Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed.Cir. 1998). A Congress determined not to create forum shopping opportunities would scarcely regard a transfer under § 1631 as in the interest of justice where the request for transfer results from forum shopping.

Finally, the assertion in the petition that the order denying transfer conflicts with *Christianson v. Colt Industries Operating Corp., supra*, 486 U.S. 800, Petition at 25, is unfounded. Whether, had the Tenth Circuit transferred the appeals, the Federal Circuit would have been required to treat the transfer decision as the "law of the case," *ibid.*, is nowhere presented on the facts here, since the Tenth Circuit ruled it was not in the interest of justice to order the transfer. There is similarly no issue whether the Federal Circuit's order of dismissal was intended to preclude a sister circuit's transfer. The issue, rather, is whether the Tenth Circuit could have concluded in all the circumstances that the interest of justice is not served by transferring these particular appeals. Denial of the transfer was indicated where petitioners were not simply seeking a second bite at the apple. They had had that second bite and were seeking yet another.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. WESTBERG
Counsel of Record
Pillsbury Madison & Sutro LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1356

Counsel for Respondent
Chevron U.S.A. Inc.

PILLSBURY MADISON & SUTRO LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

Of Counsel

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